

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT JACKSON
MAY SESSION, 1995

FILED

November 22, 1995
Cecil Crowson, Jr.
Appellate Court Clerk

FRED L. KING,)
Appellant)
vs.)
STATE OF TENNESSEE,)
Appellee)

No. 02C01-9412-CR-00280

SHELBY COUNTY

Hon. L. T. LAFFERTY, Judge

(Post-Conviction)

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OPINION FILED: _____

REVERSED AND REMANDED

David G. Hayes
Judge

OPINION

The appellant, Fred L. King,¹ appeals from an order entered by the Criminal Court of Shelby County dismissing his petitions for post-conviction relief. The appellant contends that the post-conviction court erred in dismissing his petitions without conducting an evidentiary hearing.

After a review of the record, we reverse the judgment of the post-conviction court and remand for an evidentiary hearing on the merits of the appellant's petitions for post-conviction relief.

From the record, it appears that in April of 1991, the Grand Jury of Shelby County returned eight indictments against the appellant. The indictments were as follows:

# 91-06912	--	theft over \$500
# 91-06913	--	theft over \$500
# 91-06914	--	theft over \$1000
# 91-06915	--	theft over \$500
# 91-06917	--	aggravated robbery
# 91-06918	--	especially aggravated robbery
# 91-06919	--	especially aggravated robbery
# 91-03340	--	aggravated rape, count one aggravated robbery, count two.

On April 28, 1992, the appellant proceeded to trial on indictment # 91-06914. A jury convicted the appellant of the indicted offense of theft over \$1000. On May 29, 1992, the appellant was sentenced to six years for that offense. On November 2, 1992, the appellant pled guilty, pursuant to negotiated plea agreements, to indictments # 91-06912, -13, -15, -17, -18, -19 and #91-03340.

Mr. William Moore represented the appellant on all of the guilty pleas except for

¹It is the policy of this court to use the name of the party as it originally appears in the indictment filed in this cause. For this reason, "Fred L. King" is used although the name "Freddie King" appears elsewhere in the record.

#91-06918, wherein the appellant was represented by Mr. Dan Seward.

The appellant filed a petition for post-conviction relief, #P12289, on December 2, 1993 attacking his April 1992 jury conviction for theft over \$1000 in case #91-06914. The petition alleged ineffective assistance of counsel. The petition was heard on February 18, 1994 and was taken under advisement at that time. Subsequently, on March 23, 1994, the appellant filed four *pro se* petitions for post-conviction relief attacking his convictions in case numbers 91-03340, 91-06917, -18, and -19. All of these convictions resulted from guilty pleas entered on November 2, 1992. The petitions alleged that the appellant's guilty pleas were not entered knowingly and voluntarily. Apparently, the trial court consolidated the four petitions as they are collectively numbered P12906.

On June 2, 1994, the post-conviction court entered an order dismissing petition P12906 without conducting an evidentiary hearing. The post-conviction court held that, under Tenn. Code Ann. § 40-30-112(b)(1), the grounds asserted in P12906 were waived as they should have been raised in the appellant's first petition, P12289.

The appellant now appeals from the post-conviction court's order, contending that the court erred in dismissing the petitions without conducting an evidentiary hearing. The appellant argues that the waiver provision of Tenn. Code Ann. § 40-30-112 does not bar his petitions. We find merit to the appellant's argument.

In Villeneuve v. State, 883 S.W.2d 580 (Tenn. 1994), our supreme court was faced with a virtually identical situation. Villeneuve was indicted on two counts of first degree burglary, one count of rape, and one count of sexual battery. Id. One of the first degree burglary counts was severed from the

indictment, and Villeneuve was tried and convicted by a jury on that count in July 1987. Id. Subsequently, on November 10, 1987, Villeneuve entered guilty pleas to the remaining counts of first degree burglary, rape and sexual battery. Id. On February 21, 1989, Villeneuve filed a petition for post-conviction relief, challenging his July 1987 conviction for first degree burglary, which had been severed and tried by a jury. Id. at 581. The post-conviction court denied the petition. Id. As in the case now before us, Villeneuve filed a second post-conviction petition on October 19, 1990, regarding his November 1987 guilty pleas. Id. The second petition was filed while the first petition was still pending. Id. The post-conviction court dismissed the second petition, ruling that the grounds alleged therein had been waived pursuant to Tenn. Code Ann. § 40-30-112(b)(1), as the grounds could have been raised in the earlier petition. Id. This court affirmed the post-conviction's court ruling.

The supreme court, however, reversed this court on appeal, holding in relevant part:

It is clear that T.C.A. § 40-30-112 is intended only to curtail subsequent challenges to the same conviction. To interpret the statute to require inclusion in a single petition all allegations of constitutional impropriety concerning all of a petitioner's convictions, even those arising out of separate judicial proceedings and resulting in separate convictions, sweeps with too broad a brush. It is necessary to balance the need for finality of judgments of lower courts, while still retaining the right of convicted criminals to raise legitimate post-conviction claims within meaningful time and manner.

Id. (emphasis added).

In accordance with Villeneuve, we conclude that by filing his first post-conviction petition, # P12289, challenging his April 1992 conviction for theft over \$1000, the appellant did not waive the right to subsequently challenge his other convictions through the Post-Conviction Procedure Act. The post-conviction court's order dismissing the appellant's petitions is therefore vacated, and this case is remanded to the post-conviction court for the holding of an evidentiary

hearing on the merits of the appellant's four petitions consolidated in cause number P12906.

David G. Hayes, Judge

CONCUR:

John H. Peay, Judge

William M. Barker, Judge